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The Rule of Law and European Environmental Policy

Legal Protection against Acts of the European Institutions

Jan H. Jans

1 Introduction

Access to justice is the key-word in any legal order based upon the 'Rule of Law'. The first time I met Gerd Winter, was in his capacity as *'Anwalt'* in the saga of the *Kernkraft Lingen* case.[1] With compelling and persuasive arguments he managed, against mainstream German legal doctrine, to convince the *Bundesverwaltungsgericht* that the '*Jedermann-Verfahren*' of the German *Atomgesetz*, indeed means that *Jedermann* = *Jedermann* and that individuals living outside German territory must be granted access to the decision-making process under the same conditions as those living on German territory. And that licenses granted on the basis of the *Atomgesetz* can be challenged by 'foreigners' in a court of law as well.

In the Preamble of the EU Treaty the Member States have confirmed 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of *the rule of law*'. Art. 220 EC states further that 'the Court of Justice shall ensure that in the interpretation and application of this Treaty *the law* is observed' and in Art. 230 it is stated that the European Court of Justice has jurisdiction 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any *rule of law* relating to its application, or misuse of powers'.

Ample reason therefore to look into the question of the 'challenge-ability' of European Environmental law and policy. Is there a genuine judicial review possible by the ECJ in case the European institutions take decisions affecting the environment? And what, if any, is the role of 'ordinary' citizens, like the *Jugendherbergs-Vater* mr. Hamers in the *Kernkraft Lingen* case?

2 Actions against Decisions

Actions by individuals against *Decisions* of the Council or the Commission are in principle admissible in Article 230 EC proceedings. Although the implementation of EC environmental law is largely a matter for the Member States, the Commission can increasingly be seen to possess powers to take decisions in the field of or related to the environment. Sometimes these powers are conferred by the Treaty, in other cases by secondary legislation.

An example where the Commission derives its powers from the Treaty is provided by the provisions relating to state aid (Articles 87 and 88 EC). These articles are also relevant for the assessment of national aid for the protection of the environment. They give the Commission the power to approve national environmental

[1] See J.H. Jans, *Grenzüberschreitendes Umweltrecht*, Köln 1990.

aids, not to approve them or to make aid subject to certain conditions, and other, more procedural decisions can also be taken.

Another example is provided by the Treaty provisions on competition law (Articles 81 and 82 EC). In practice, it has become clear that certain practices of undertakings, even when they concern environmental protection, can conflict with Treaty provisions. Here too, the Commission has the power to take decisions.

As far as the Commission's powers under secondary legislation are concerned, particular reference is made to Regulation 2037/2000 on substances that deplete the ozone layer.[2] This provides that a license issued by the Commission is required for the release into free circulation in the Community of certain ozone depleting substances (Article 6). Article 7 of Directive 2001/18 concerning the deliberate release into the environment of genetically modified organisms[3] is another example. This directive also provides for powers, in this case relating to the placing on the market of products. Finally, it should be noted that the Commission also has powers to finance projects in the context of the Structural Funds.[4] As provided in Article 12 of Regulation 1260/99, such measures must be in keeping with Community policies on environmental protection. Here, too, the need may be felt for judicial protection against decisions by the Commission which take insufficient account of European environmental law. In any event, persons to whom decisions of the Commission with an environmental impact are addressed may in any event appeal under Article 230 EC. Such an appeal must be lodged with the Court of First Instance.

With respect to *locus standi* of individuals we have to distinguish between decisions addressed to the individual itself and decisions addressed to others. The text of Article 230 (4) makes is perfectly clear that individuals have, more or less automatic, standing against decisions addressed to them.

The following examples can be mentioned. In the case of the Ozone Regulation, it is the importer who should be considered the applicant and the person addressed.[5] In the case of decisions based on the provisions of Articles 81 and 82 the undertakings concerned should be regarded as the persons addressed.

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2 OJ 2000 L 244/1.

3 OJ 2001 L 106/1.

4 Regulation 1260/99, OJ 1999 L 161/1.

5 Admissibility is no problem whatsoever: cf. case T-336/94 *Efisol* [1996] ECR II-1343.

In addition to the persons to whom a Decision is addressed, interested parties may also be admissible in Article 230 proceedings, if the decision is of *direct and individual concern* to them.

In the other examples mentioned above it is often the Member State to which the decision is addressed. It is the Member State which is given the option of granting aid for the protection of the environment or not and it is the Member State which can be considered the beneficiary of structural fund projects.

Sometimes a Decision is addressed to other individuals. In those cases 'competitors' can feel the need to challenge the Decision.

The case law on this point can briefly be summarized as follows: an interested party is admissible if he is affected by the decision in a manner which distinguishes him from others. While the Community was more or less exclusively aimed at market integration, this criterion was sufficient. Where an importer, exporter or other market participant was affected in his particular *private* interests, the criterion of *direct and individual concern* would distinguish him from all other market participants. This means that where an 'environmental decision' of the Commission affects a market-participant in his private market interests, there will often be no problem as regards admissibility.

A case in point is the judgment of the Court of First Instance in *Waterleiding Maatschappij 'Noord-West Brabant' NV v.* Commission.[6] The case involved a decision of the Commission not to open formal procedures under the state aid rules of the Treaty against certain environment-related tax reliefs in Dutch law. With respect to some of the tax reliefs the Court found that they directly affected the structure of the market in which the applicant operated and therefore affected its competitive position on that market. The applicant therefore had to be regarded as directly and individually concerned by the contested decision of the Commission.

The same line of reasoning can probably be applied in the case of Article 81(3) exemptions, for example in the context of an environmental agreement where competitors who consider themselves disadvantaged would probably be admissible.

The judgment of the Court in case *C-295/92* points in this direction.[7] This case concerned the intention of the Dutch parliament to adapt taxes on fossil fuels in such a way that the energy content and the carbon content would each count for

6 Case T-188/95 *Waterleiding Maatschappij 'Noord-West Brabant' NV v. Commission* [1998] ECR II-3713.

7 Case C-295/92 *Landbouwschap v. Commission* [1992] ECR I-5003.

half. The measure contained a number of exemptions, including one for large-scale industrial users. The measure had been notified to the Commission as state aid within the meaning of Article 87(1). The Commission considered the measure compatible with the common market. The Dutch Agricultural Association (*Landbouwschap*) considered the exemption for large-scale industrial users unlawful and lodged an appeal. There was a background of many years of discussion about the price of gas for the glasshouse sector. The Court of Justice declared the Association inadmissible, because the aid in question would only benefit a group of large industrial undertakings, which were not in competition with either the Association or the glasshouse farmers it represented. According to the Court, the interests of the Association would not be affected in any way whether the Commission decision was upheld or annulled. *A contrario,* it could be inferred from this that if an interested third party is in direct competition and the interests of the third party have been affected by a decision, an appeal would be admissible.

In the light of this case law, the legal protection of this category of individuals would probably cause few problems. The most important condition is that there must be a competitive relationship between the party ultimately benefiting from the decision and the party lodging the appeal.

Much more complicated is the admissibility of individuals who object to a Commission decision on *environmental* grounds. Here there are no private and thus specific interests at issue but, on the contrary, the public interest. The case law mentioned above, which required that a person's interests be specifically affected cannot, almost by definition, fulfil a distinguishing function here. After all, the key feature of the public interest is that it is universal, applicable to all. If the criterion of *direct and individual concern* is applied with full force this must inevitably produce the paradoxical result that the more serious the infringement (the harm to the environment) and the wider the group potentially affected the less is the likelihood that the criterion can be met.[8] The judgments of the CFI and the ECJ discussed below show that both these courts have fallen into this paradoxical trap. The leading case on the admissibility of interested third parties trying to annul decisions affecting the environment is still the *Greenpeace* case.[9]

This case concerned two power stations on the Canary Islands, for which no environmental impact assessment had been prepared. Greenpeace had appealed against a decision of the Court of First Instance.[10] That Court had declared Green-

8 Cf. Gerd Winter, "Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluß des Gemeinschaftsrechts" (1999) *NVwZ* 467-475.

9 Case C-321/95P *Greenpeace v. Commission* [1998] ECR I-1651.

10 Case T-585/93 *Greenpeace v. Commission* [1995] ECR II-2205. Cf. also case T-117/94 *Associazione Agricoltori della Provincia di Rovigo and Others v. Commission* [1995] ECR II-455 and case C-142/95P *Associazione Agricoltori della Provincia di Rovigo and Others v. Commission* [1996] ECR I-6669.

> peace's action seeking annulment of a Commission decision to pay the Spanish Government ECU 12 million from the European Regional Development Fund for the construction of the two power stations inadmissible. The Court of First Instance had reached this decision referring to the settled case law of the Court of Justice according to which persons other than the addressees may claim that a decision is of direct concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed. The Court of First Instance observed that whilst this case-law concerned essentially cases involving economic interests, the essential criterion which it applied remained applicable whatever the nature, economic or otherwise, of the applicants' interests which were affected.

Accordingly, the CFI held that the criterion proposed by the applicants for appraising their *locus standi,* namely the existence of harm suffered or to be suffered, was not in itself sufficient to confer *locus standi* on an applicant. This was because such harm might affect, in a general abstract way, a large number of persons who could not be determined in advance in such a way as to distinguish them individually just like the addressee of a decision, as required under the settled case-law mentioned above. There was thus no question of a special regime of *locus standi* in respect of Community environmental decisions, reflecting the public function of the environment.

> In this regard the Court of First Instance held that the status of a 'normal' interested third party, such as a 'local resident', 'fisherman' or 'farmer' or of persons concerned by the impact which the building of two power stations might have on local tourism, on the health of Canary Island residents and on the environment did not differ from that of all the people living or pursuing an activity in the areas concerned and that the applicants thus could not be affected by the contested decision otherwise than in the same manner as any other local resident, fisherman, farmer or tourist who was, or might be in the future, in the same situation.

As far as the *locus standi* of the organization Greenpeace was concerned, the Court of First Instance observed that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned, for the purposes of the fourth paragraph of Article 230 EC, by a measure affecting the general interests of that category, and was therefore not entitled to bring an action for annulment where its members could not do so individually. On appeal the Court of Justice upheld the decision of the Court of First Instance.

3 Actions against Directives and Regulations

The protection of individuals against breaches of EC environmental law by public authorities of the Member States or by other individuals, through the doctrines of direct effect and supremacy, is largely effected through national procedures. However, where an individual objects to the very substance of EC environmental law and policy, there are few means of obtaining a remedy at national level. Even if the validity of an environmental directive could be challenged before a national court, under Community law the national court is not competent to pronounce on its validity.[11] In that case the national court will avail itself of the preliminary ruling procedure set out in Article 234 and refer the matter to the Court of Justice. The Treaty does not offer individuals any form of *direct* legal protection in such a case.

> An example in the case law of the ECJ were individuals, in a preliminary ruling, challenged the validity of an environmental directive was the *Standley* case.[12] In the *Standley* case the Court considered the Nitrates Directive. It was argued that this directive gave rise to disproportionate obligations on the part of farmers, so that it offended against the principle of proportionality. The Court was not impressed. After a careful study of the Nitrates Directive it came to the conclusion: 'that the Directive contains flexible provisions enabling the Member States to observe the principle of proportionality in the application of the measures which they adopt. It is for the national courts to ensure that that principle is observed.' This conclusion will be applicable to most, if not all, Community environmental legislation. But even if the ECJ would declare an environmental directive invalid, this would not necessarily imply that the national implementing legislation is invalid too.

Neither will an action for annulment under Article 230 EC offer a solution. Actions for the annulment of directives or regulations brought by individuals will certainly be ruled inadmissible.[13] With respect to Regulation 259/93 on the supervision and control of shipments of waste, the ECJ ruled in the *Buralux* case that, undertakings specializing in the collection, shipment and dumping of household waste cannot be regarded as individually concerned by the provision in the regulation to take measures to prohibit generally or partially or object systematically to shipments of waste, since such undertakings are concerned by the provision in question only in their *objective capacity* as economic operators in the sector of waste shipments between Member States in the same way as

[11] Case 314/85 *Foto-Frost* [1987] ECR 4199.

[12] Case C-293/97 *Standley* [1999] ECR I-2603.

[13] Case T-475/93 *Buralux v. Council* [1994] ECR 3229 and case C-209/94P *Buralux v. Council* [1996] ECR I-615.

any other operator in that sector, and do not constitute a limited class of identified or identifiable operators who are particularly concerned by that provision on account of their special situation. Key words in this judgment are: 'objective capacity'. Most directives and regulations will affect individuals in such a capacity.

The result of the 'objective capacity'-doctrine[14] is that in general private parties do not have *locus standi* at the ECJ to challenge Regulations and Directives. How does this doctrine relate to the 'Rule of Law'? The Court of Justice itself has confirmed that access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the institutions.[15] The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR.[16] In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000.[17] In the *Jégo-Quéré* case the Court of First Instance found it therefore necessary to consider whether, in a case where an individual applicant is contesting the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.[18]

> The case concerned an action for annulment of Articles 3(d) and 5 of Commission Regulation 1162/2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels.[19] Jégo-Quéré is a fishing company established in France which operates on a regular basis in the waters covered by the Regulation. Jégo-Quéré claimed to be the only one fishing on a regular basis in the said waters. Jégo-Quéré argued further that its action for annulment is admissible, because otherwise it would leave it without any remedy, since no act has been adopted at national level against which legal proceedings could be brought. Applying the 'objective capacity' approach the CFI found that

[14] Or as it has been called since Case 25/62 *Plaumann* [1963] ECR 95; the 'Plaumann-doctrine'.

[15] Case 294/83 *Les Verts* v *European Parliament* [1986] ECR 1339, paragraph 23.

[16] Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18.

[17] OJ 2000 C 364/1

[18] Case T-177/01 *Jégo-Quéré* ECR [2002] II-2365.

[19] OJ 2001 L 159/4.

the contested provisions are, by their nature, of general application and that the applicant could not be regarded as individually concerned within the meaning of Article 230 EC. However, it did not stop there, but discussed the case in the light of the applicants right to an effective remedy. According to the CFI, the alternative route of proceedings before the national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC, was unavailable in this case, as there were no acts of implementation capable of forming the basis of an action before national courts. 'The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice' the CFI argued.[20] Also the other alternative route (damages ex Art. 288 EC) is not available according to the CFI; 'The procedural route of an action for damages based on the non-contractual liability of the Community does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application, such as the provisions contested in the present case, is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals'.[21] Subsequently the CFI came to the inevitable conclusion that the procedures provided for in, Article 234 EC and Article 288 EC 'can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation'. The strict interpretation of the notion of 'individual concern' of Art. 230 EC had to be reconsidered, the CFI argued and developed a new test to be applied: 'a natural or legal person is to be regarded as individually concerned by a Community measure

[20] See also point 43 of the Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* ECR [2002] I-6677.

[21] Cf. Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 to 43 and Case T-155/99 *Dieckmann & Hansen* v *Commission* [2001] ECR II-3143, paragraphs 42 and 43.

> of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard'. And declared Jégo-Quéré admissible to challenge the regulation.

However, the new doctrine did not survive for very long. Although scheduled for October 2002, the ECJ – during its official vacation – gave judgment in Case C-50/00P *Unión de Pequeños Agricultores* v *Council*.[22]

> This case involved an appeal against an order[23] of the CFI in by which that court dismissed an action for partial annulment of Regulation 1638/98 on the establishment of a common organisation of the market in oils and fats[24]. Like in the Jégo-Qéré case the applicant in UPA argued that his action vis-à-vis the regulation is admissible, in view of the fact that there is no legal remedy under national law available to him. Like the CFI, the ECJ acknowledged its commitment to the Rule of Law: 'The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights' and that 'individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order'. However according to the system of judicial protection developed by the EC Treaty, where natural or legal persons cannot directly challenge Community measures of general application, they are able, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, to make a reference to the Court of Justice for a preliminary ruling on validity. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. The ECJ added that in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. However the absence of national remedies do not allow individuals to bring proceedings to contest the validity of Community

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[22] Case C-50/00 P *Unión de Pequeños Agricultores* v *Council*, judgement of 25 July 2002, nyr.

[23] Case T-173/98 *Unión de Pequeños Agricultores* v *Council* [1999] ECR II-3357.

[24] OJ 1998 L 210/32.

> measures. 'Such an interpretation would require the Community Court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures', according to the ECJ. Finally the ECJ argued that, although the condition 'direct and individual concern' must be interpreted in the light of the principle of effective judicial remedy, 'such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.' And to close the door, the ECJ concluded that, ''while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.'

This judgment shows that the strict interpretation of 'direct and individual concern' is still very much at the centre of Article 230, fourth paragraph. *Locus standi* for individuals to challenge at the ECJ environmental regulations and directives would require, in the light of the *UPA* judgment, an amendment of the EC Treaty.

4 Conclusion

The case law of the ECJ shows that individuals are deprived of any direct legal protection at the ECJ against environmental directives and regulations. In general, individuals would have alternative routes available to them, particular at the national level. However the recent judgment of the ECJ in *UPA* shows that in absence of such a national alternative, the ECJ will not open the door of Article 230 EC. The *de facto* result is a loophole in the Community system of legal protection and the possibility that some Community measures are not subject to judicial review by the ECJ.

Furthermore, the case of the Court shows that the ECJ has failed adequately to appreciate that the old remedies, designed to protect *private* interests, are inadequate to protect *public goods*, such as the environment. As long as European law fails to acknowledge, the sombre conclusion must be that legal protection against European decisions having significant environmental effects is seriously flawed. This is unworthy of a legal order devoted to the Rule of Law. In *UPA* the ECJ made clear that the ball is now in the courtyard of the Member States as *Herren der Verträge*. We have to wait to see the results until the next round of Treaty-negotiations have been completed.